

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5285 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ABDULSATTAR I SHAIKH

Versus

EXECUTIVE ENGINEER

Appearance:

MR SURESH M TRIVEDI for Petitioner

Ms.S.K.Vishen for

M/S TRIVEDI & GUPTA for Respondent Nos. 1 to 3

MR L.R.Pujari, learned AGP for Respondent No. 4

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 28/01/99

ORAL JUDGEMENT

1. The petitioner claims to be a member of Socially & Educationally Backward Class on the basis of a Certificate held by him as issued by the Mamlatdar, Kapadvanj. A copy of this Certificate has been placed on record as Annexure'A'. The petitioner also claims that he has passed English type examination of 30 w.p.m. in

April/May 1990 and Gujarati type examination of 20 w.p.m. in March 1986 and Gujarati type examination of 25 w.p.m. in July 1989 as conducted by State Examination Board for the State of Gujarat. The petitioner also claims to have appeared in English type examination of 40 w.p.m. by the same Board in June 1990 but he says that the Certificate to that effect had not been issued and that the same will be issued in due course. The petitioner has also come with the case that a Certificate has been issued in his favour by the Government recognized Institution, namely, 'Shree Ganesh Type Classes, Kapadvanj' where the petitioner had undergone this course. A copy of this Certificate has also been placed on record. The petitioner has also come with the case that he had passed the Higher Secondary Examination (Commerce Stream) conducted by Gujarat Secondary Examination Board, Gandhinagar in April 1982. The petitioner thus claiming eligibility for appointment as Typist, has stated that he was appointed as English Typist in the office of the Executive Engineer, Narmada Yojna Naher Vibhag, Thasra. He had faced the interview before the Selection Committee and after the interview dated 25.10.89 for the post of English Typist his candidature was considered as sponsored through the Employment Exchange, Nadiad, District - Kheda and vide order dt.16.11.89 he was given appointment as English Typist as daily wager, temporarily for a period of one month in the first instance. In pursuance of this order dt.16.11.89 the petitioner joined on 19.11.89. The term of appointment was extended by various orders passed from time to time and the last order, to which the petitioner has made reference, is the order dt.6.3.90, which has been produced by the petitioner alongwith Special Civil Application as Annexure 'K'. This appointment was again an appointment for a period of one month only. The petitioner then says that even after the expiry of this period of one month, he was allowed to continue in service on the same terms till 15.7.91 on which date his services were orally terminated because he refused to attend the office at the odd hours in night. The petitioner has thus assailed the aforesaid action of his oral termination and has complained of the violation of the Circular dt.27.6.90 annexed with the petition as Annexure 'L' issued by Narmada Water Resources Department of the Government of Gujarat wherein it has been provided that in case the worker is required to be terminated due regard must be given to the seniority and the provisions of Industrial Disputes Act so as to give the notice/notice pay and compensation. The petitioner has also stated that there is heavy work load of English Type and the 3rd post of English Typist is also sanctioned and that the posts of

English Typists are lying vacant. It has also been clarified that there were 2 posts of English Typists and 1 post of Gujarati Typist and the 3rd post of English Typist is also sanctioned by the Department and after his termination 2 posts of English Typists were lying vacant. He has claimed the reliefs for setting aside the action of his unlawful termination with effect from 16.6.91 and has also sought a direction that he be appointed on a vacant post of English Typist. The petitioner has claimed the relief of reinstatement with full backwages.

2. The petitioner's claim, as aforesaid, has been sought to be traversed on behalf of respondents Nos.1 to 3 through the affidavit-in-reply dt.4.12.91 and the additional affidavit-in-reply dt.15.9.92. The respondents have taken the stand that the petitioner's appointment was only contractual and ad hoc appointment on daily wages basis, he can not claim regular appointment and the Narmada Project authorities had no competence either to give the regular appointment or to appoint him on permanent basis and absorb him. It has also been stated in para 6 at page 6 of the affidavit-in-reply dt.4.12.91 that the petitioner's appointment was discontinued in view of the terms and conditions on which the petitioner was appointed as daily wage typist and while doing so it has also been denied that 2 posts of English Typists were lying vacant and that the Circular dt.27.6.90 was not applicable and hence there is no question of following the requirements of giving notice or notice pay and the compensation. In the additional affidavit-in-reply dt. 15.9.92 it has been stated that it is not conceded that the respondent Nigam is an industry within the meaning of S.2(j) and further that the petitioner is a workman within the meaning of the terms 'workman' as defined in S.2(s). Applicability of the Circular dt.27.6.90 has also been contested and a bald denial has been made in para 5 of this additional affidavit-in-reply against the petitioner's case that he had worked with the respondent Nigam continuously and without any break and that he has served for more than 240 days. Learned counsel for the respondents Nos.1 to 3 has submitted that in any case in view of the provisions of S.2(oo) (bb) it is not a case of retrenchment and hence S.25F of the I.D.Act was not required to be followed.

3. It appears from the record of the proceedings in this case that after issuing notice to the respondents and after hearing both the sides and considering the affidavit-in-reply dt.4.12.91 and the additional affidavit in reply dt.15.9.92 filed by the respondents,

Rule was issued in this case on 19.10.92. While issuing the Rule it has also been recorded in the order that no interim relief as prayed for could be granted and the ad interim relief, which was granted in terms of para 16(d) was vacated with the direction that the person who will be absorbed shall be either on deputation or on transfer and, therefore, the respondent - Corporation shall accept such employee on deputation or transfer subject to the result of this petition with clear information to such employee that he is on deputation only subject to the result of this petition and he shall abide by the final decision of this Court. The contents of this order dt.19.10.92 are reproduced as under:-

"SPECIAL CIVIL APPLICATION NO.5285/91

CORAM :S.D.SHAH,J

(19th October, 1992)

ORAL ORDER:

1. Rule returnable in February, 1993.
2. M/s.Trivedi, Gupta & Dave waive service of Rule on behalf of respondents.
3. The petitioner who was temporarily appointed as English Typist has challenged the order of his termination from service. The order of termination is already implemented. It is the case of the respondent Corporation that they have no power to appoint and the entire staff of the corporation is adjusted either by employees of the State Govt sent on deputation or sent on transfer. Some 6/7 Typists/Stenographers who are rendered surplus in State Govt. service are required to be accommodated and out of said six persons one person is to be accommodated in the respondent - Corporation. In view of the order passed by the Ld. single judge the respondent corporation is prevented from making any appointment and, therefore, the work of the corporation also suffers. In that view of the matter, I am of the opinion that no interim relief as prayed for could be granted and the ad-interim relief which is granted by the learned single judge requires to be vacated, and is hereby vacated. However, it is directed that the person who will be so absorbed shall be either on deputation or on transfer. It is directed that the respondent corporation shall accept such employee on deputation or transfer subject to the result of this petition with clear information to such employee that he is on deputation only subject to result of this petition and he

shall abide by the final decision of this court.

19.10.92 (S.D.SHAH,J)"

The aforesaid order was passed by the Court on the date the Rule was issued because it was given out on behalf of the respondents that some 6/7 Typists/Stenographers, who were rendered surplus in the State Government service, were required to be accommodated and out of the said 6 persons, one person was to be accommodated in the respondent - Corporation.

4. I have heard learned counsel for both the sides.

It appears to be the admitted position that the petitioner was given appointment on 16.11.89 in pursuance of which he joined on 19.11.89. He was continued in the service by various orders passed from time to time. The last order was the order dt.6.3.90 and thereafter no order extending the period of appointment further was passed. However, the fact remains that without passing any order after 6.3.90 the petitioner was allowed to continue in service upto 15.7.91 and was subjected to oral termination on and from 16.7.91. Thus, there is no basis for the respondents to say that the petitioner did not complete 240 days in the service nor it can be said that the oral termination brought about on 16.7.91 was the direct result of the terms of contract even if it is taken that the appointment was on contractual basis. Whereas no order was passed after 6.3.90 and the petitioner was allowed to continue without subjecting him to any contingency or defined date, in absence of any order after 6.3.90 the element of uncertainty entered and after 6.3.90 without giving any time bound appointment to him for any defined period he was continued for a period of even more than one year and thereafter on one fine morning he was not allowed to join the duties on account of the oral termination brought about from 16.7.91, as aforesaid. Whether this termination was brought about against the petitioner because he refused to attend office at the odd hours in night or for any other reason, may not be a subject matter of inquiry before this Court and even if the case of the respondent is accepted that after 6.3.90 the petitioner was allowed for administrative reasons to continue in service till 16.7.91, it is no answer against the violation of requirements of S.25F of the Industrial Disputes Act. There was no contract that the petitioner shall continue in service only upto 15.7.91 and after 15.7.91 his appointment shall automatically come to an end by efflux of time. In absence of such contractual term, it cannot be said that the petitioner's oral termination, as

aforesaid, was in accordance with the terms of contract. This factual position clearly explains that there is no question of invoking Section 2(oo) (bb) because it cannot be said to be a case of termination in terms of contract. It is clear from the facts narrated above that the petitioner had worked from 19.11.89 to 15.7.91 and had thus completed a period of 240 days so as to enure the benefits of S.25F of the Industrial Disputes Act. The argument that Narmada Project of the respondent Corporation is not an industrial establishment and the petitioner is not a workman thereof is not at all open to be raised or considered after the decision rendered by the Supreme Court in the case of The Bangalore Water Supply and Sewerage Board v. A.Rajappa, reported in AIR 1978 SC 969. It is admitted that the requirements of S.25F of the Industrial Disputes Act were not followed and the oral termination of the petitioner brought about from 16.7.91, even if for reasons administrative or otherwise, must have preceded the following of the requirements of S.25F of the Industrial Disputes Act. The notice or the payment of one month's pay in lieu of notice alongwith other benefits as contemplated under S.25F should have been given/made as a pre requisite because it was a case of retrenchment under the Industrial Disputes Act.

5. In the facts and circumstances of this case, the petitioner may not be entitled to the reliefs with regard to the direction for regular appointment or his absorption on permanent basis, but the termination is certainly violative of the provisions of S.25F of the Industrial Disputes Act, which should have been followed as a pre condition and, therefore, the termination of the petitioner cannot be sustained in the eye of law and has to be declared as illegal.

6. Before parting with the order, it may also be mentioned that when the matter came up before the Court on the earlier date without recording specifically as such on 19.1.99, the learned counsel for the respondents was told to seek instructions from the respondents as to whether the respondents were still ready to take the petitioner back in service and it was also made clear that should the respondents themselves agree to take the petitioner back in service, the petitioner may be persuaded to forgo the wages for the past period. However, the respondents have taken an adamant attitude and it has been stated on behalf of the respondents by the learned counsel Ms.Vishen before this court that the respondents are not prepared to consider even to take the petitioner back in service without paying any backwages

for the past period.

7. The net result of the aforesaid discussion is that the petitioner's oral termination (retrenchment), as brought about on and from 16.7.91, is found to be void and the same is hereby quashed and set aside and it is directed that the petitioner be reinstated in the service and the petitioner shall also be entitled to all consequential benefits right from the date of his termination, but it is made clear that the petitioner shall be entitled to the financial benefits relating to wages only for such period for which he has remained unemployed after 16.7.91 and should the petitioner file a proper affidavit with regard to his being employed/ partly employed/unemployed during the period of enforced idleness from 16.7.91, the respondents shall be obliged to make the payment of backwages accordingly for such period for which he remained unemployed and notwithstanding the question of backwages, the petitioner shall be treated to be continuing in service for all other benefits as if his services had never been terminated on and from 16.7.91. If any person is occupying the post of English Typist, on the basis of deputation or transfer, the respondents will pass appropriate orders to make room for the petitioner in terms of this Court's order dt.19.10.92, which has already been reproduced in the earlier part of this order.

8. Special Civil Application succeeds in the terms as aforesaid and the Rule is also made absolute in the terms as aforesaid. No order as to costs.